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No. ~~888~~ 141

Supreme Court of the United States

OCTOBER TERM, 1948.

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

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June, 1949.

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Supreme Court of the United States

OCTOBER TERM, 1948

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

To The Honorable Supreme Court of the United States

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

This case was commenced on April 9, 1946, in the United States District Court for the Western District of Oklahoma. Jurisdiction of the Federal Court rests solely on diversity of citizenship. The petitioners, plaintiffs in the District Court, are citizens of California, and Oklahoma County by its Board of County Commissioners, defendant in the District Court, is a political subdivision and munici-

pal corporation of the State of Oklahoma. The petitioners will be sometimes referred to herein as plaintiffs and the respondent as defendant or the County.

The plaintiffs sued in ejectment to recover possession of certain real estate described as Lots 17 to 24, inclusive, and 39 and 40 in Block 3 in Main Street Addition to Oklahoma City, Oklahoma County, Oklahoma. They alleged that they conveyed this land for the consideration of $4,000.00 to the defendant on January 3, 1903, by deed containing the following conditions, to-wit:

> "This grant and conveyance is made, however, subject to the following conditions:
>
> "That if the said grantee shall fail and neglect to have erected on said ground herein conveyed a court house and jail to be used for court and jail purposes for said county on or before the first day of January, 1910, and shall fail to plant good healthy shade trees to ornament said ground, and make sufficient appropriation each year to procure proper care to be taken of such trees and ground, so that said trees shall live in a healthy condition, then and in that event this grant shall be null and void and said land shall revert to the grantors herein upon the grantors' paying to the said grantee herein the sum of Four Thousand Dollars together with interest thereon at the rate of seven per cent per annum from the date of this instrument" (R. 2).

And that these conditions of the deed were broken by the County in that:

> "It never at any time erected a court house and/or a jail on said land, although it did erect a court house part of which was on said land, and in that it never

did use any building erected on said land or any part thereof for jail purposes, and in that it ceased to use the building erected partly on said land for a court house on or about the 31st day of October, 1937, and in that it failed to plant good healthy shade trees to ornament said ground and to make sufficient appropriation each year to procure proper care to be taken of said trees and ground and in fact has made no appropriation whatever for that purpose since the year 1937, and in that the trees planted on said ground have not, because of lack of proper care taken of them and the ground by the defendant, lived in a healthy condition, but all of them which were planted on said land within the first twenty years or so after the execution and delivery of said deed have died or are dying" (R. 2-3).

They further alleged that by reason of the breach of the conditions in the deed the title to the land became null and void and subject to reversion to them upon their payment of the sum of $4,000.00 with interest at the rate of 7% per annum from January 3, 1903, and that on March 25, 1946, they tendered payment of said sum and interest, being the full sum of $16,110.00, to the defendant, which tender was rejected (R. 3).

They prayed for possession and the establishment of their title to the land (R. 3).

The defendant answered admitting the jurisdictional facts and allegations in respect of the deed. It averred that the courthouse was timely erected on the lots in question and other lots in the same block and that trees were planted as provided in the deed. It did not deny the erection of a jail on other lots, but alleged justification as follows:

"These defendants further answering allege and state that said plaintiffs should be estopped to assert the claim that the lots in question were not used for the purposes stated in the deed for and because the said plaintiffs permitted said court house to be erected and said jail to be erected without objection thereto and permitted said lots to be so used for a period of approximately forty (40) years. And that said plaintiffs have by their acts and by their acquiescence in the use of said lots in the manner and form that they were used construed their contract to be fully complied with and construed the acts of the defendants as being in full compliance with the provisions of the deed. That all parties to the deed and contract have placed a construction upon said deed and the terms thereof and by such construction have construed the conditions of the deed to be and mean that the court house and jail are erected upon said lots in question and that proper care has been taken of the trees and grounds" (R. 9-10).

It alleged other special defenses not material here (R. 10-11).

For the trial it was stipulated that in 1904 the defendant began the erection of the County Courthouse, situated partly on the lots here involved and partly on land adjoining on the north, and completed the same within the next year and that in 1905 and 1906 it erected a County Jail on other land in the same block, no part of said jail being on the lots involved in this action (R. 13).

It was further stipulated that the Courthouse was used for courthouse purposes until September, 1937, when a new courthouse was completed and occupied and that the old one had not since that time been used for courthouse

purposes and that beginning on September 30, 1938, the old courthouse and grounds, including the lots here involved, had been leased to various agencies of the United States until November 26, 1944, when it was badly damaged by fire and that since that date the building had been unoccupied and the ground, including the premises here involved, had been used as an automobile parking yard and were then rented for that purpose at a rental of $500.00 a month (R. 13-14).

It was further stipulated that the Board of County Commissioners had taken statutory proceedings to sell the entire courthouse and ground and had had the same appraised by appraisers appointed by the District Court of Oklahoma County and had advertised the same for sale to the highest bidder, but had failed to receive a bid for 80% of the property's appraised value as required by the Oklahoma Statutes, and that thereafter they had applied to said District Court for the appointment of new appraisers and had obtained their appointment and that the property had been re-appraised and again advertised for sale, and that again they had failed to obtain a bid of as much as 80% of the re-appraised value as required by the Statutes (R. 14-15).

It was further stipulated that the plaintiffs had tendered, on March 28, 1946, the sum of $15,110.00, being $4,000.00 with interest at 7% from January 3, 1903, to the County, and that such tender had been rejected (R. 15-16).

It was further stipulated that the County in apt time planted good healthy shade trees to ornament the ground

conveyed by the plaintiffs' deed and had made sufficient appropriation each year prior to 1938 to procure proper care to be taken of such trees and ground so that the trees should live in a healthy condition (R. 16).

Two plats of the courthouse grounds were attached as exhibits to this Stipulation (R. 19-21).

Upon the trial the question of introduction of evidence to aid in the interpretation of the deed arose, and the attorney for the defendant said:

> "I think it is important to have the evidence of the background showing circumstances surrounding the parties of the transaction" (R. 37-38).

And on being pressed by the court to say whether he considered the deed ambiguous, made the further statement:

> "Mr. Hoyt: I think I will make the statement here, then, that the deed is ambiguous, and it may require other evidence to set forth the intention of the parties.
>
> "The Court: If that is your contention, I feel I should hear the evidence.
>
> "Mr. Hoyt: I take that position" (R. 40).

Thereupon the attorney for plaintiffs said:

> "Since it is agreed that the deed is ambiguous, I desire to put on Mr. Russell's deposition showing his intention and purpose of the deed, and his understanding of the language and effect of it" (R. 41).

Mr. Russell testified that he proposed to sell the lots to the County for about $8,000.00, but this was not accepted; that then he proposed to take $4,000.00, or half

price, for them upon certain conditions to be put in the deed; that he was a member of the Chamber of Commerce of Oklahoma City at the time and much interested in its growth; that there was no park within walking distance of the business center of the City and his motive for placing the provision in the deed for care of the trees and grounds was to provide a place where a person could sit down and rest in the shade (R. 107, 113-114); that it was his intention when he executed the deed that the property would be used for a courthouse indefinitely and the ground kept up as a park indefinitely, and if ever those uses ceased, the property would revert to him on payment of the original purchase price and interest as provided in the deed; that there was to be no limitation of the time for which such uses were to continue; and that he understood the language of the deed to have that meaning (R. 116).

Further evidence for the plaintiffs showed that the County had made no appropriation for the care of the trees and ground after 1937 (R. 136); that they had not been cared for and many of the trees were dead and others dying; and that the ground was in use for an automobile parking yard which made it impossible for the trees to live in a healthy condition or the grounds to be used as a public park (R. 54-71). Photographs showing the condition of the trees and ground and the old Courthouse at the time the suit was filed were introduced (R. 133-143).

It was stipulated that improvements on the ground did not have a salvage value or any value in excess of the cost of removing those improvements (R. 51).

The trial court's findings of fact included the following:

"The courthouse was used for court purposes for Oklahoma County until September, 1937, at which time a new court house at a different location was completed and occupied and the one here involved was vacated and has never since been used for courthouse purposes.

"The defendant made sufficient appropriation each year prior to the year 1938 to procure proper care to be taken of the trees and ground and the trees lived in a healthy condition. No such appropriation was made after that time and the trees have not lived in a healthy condition, but many of them have died and others are in a neglected and dying condition. Since prior to the commencement of this action, the ground has been used for an automobile parking yard.

"At the instance of both parties, extraneous evidence was introduced at the trial to aid in the interpretation of the conditions of the deed. Upon this evidence and the language of the deed, giving effect to every clause, word and expression in it, the court finds that it was the intention of the parties, and particularly of the grantor, that the grant was on the conditions (1) that the courthouse should be used continuously after its erection for courthouse purposes, and (2) that the defendant would in each year continuously after the planting of the trees, make an appropriation for their proper care; that upon the breach of either of these conditions, the title to the land would revert to the grantors upon payment by them to the grantee of the purchase price, to-wit, the sum of $4,000.00, with interest thereon at the rate of seven per cent (7%) per annum from the date of the deed; and the conditions of the deed are so interpreted" (R. 28-29).

The court concluded that plaintiffs were entitled to judgment for recovery of the property sued for (R. 29) and judgment was rendered for them upon their payment of $16,110.00 into the registry of the court for the use of the defendant (R. 31).

In addition to Findings of Fact, the court also filed a Memorandum Opinion, a part of which reads as follows:

> "The real contention of defendant is that there was no agreement to use the ground perpetually for courthouse purposes or to make appropriations to care for the trees any specified length of time. These matters are disposed of by contrary findings of fact. The testimony of Mr. Russell is clear and convincing.
>
> "However, there is no need to look further than the deed to determine that the last condition has been broken. It is clear and unambiguous. It requires that sufficient appropriation be made each year to care for the trees so that they shall live in a healthy condition. No such appropriations were made after 1937. Not only were the appropriations not made but the property was used as a public parking lot, making healthy growth impossible. The bark was knocked from some of these beautiful trees completely around the trunk and several of them died. According to the testimony, if properly cared for these trees had many more years of life.
>
> "There was some evidence that the building is being used to store County records and that some small appropriation had been made to care for the trees. The court specifically finds that the records were stored there and the appropriation made for the care of the trees after this suit was filed and for the express purpose of affecting the outcome of the case. The court

also finds that this appropriation for the care of the trees was not for their care but solely for the purpose of removing dead trees and limbs" (R. 30).

On appeal the Court of Appeals, Tenth Circuit, reversed the trial court (R. 151-160). The grounds for reversal may be summarized as follows:

1. That the trial court erred in receiving parol evidence in construing the conditions in the deed, notwithstanding the agreement of the parties upon the trial that such evidence should be received.

2. That Russell's testimony as to his intention in executing the deed and his understanding of the meaning of the language used was not evidence of its meaning and had no probative value, even if it had been properly received.

3. That the trial court erred in holding that the deed required the County to use the premises continuously for courthouse purposes and to care for the trees and grounds continuously without time limit and that its failure at any time to do so was a breach of the conditions in the deed.

4. That the deed was not ambiguous and, notwithstanding the parties had agreed that it was ambiguous, that it merely required the County to erect a courthouse and jail within the time stipulated and to plant and care for the trees for the same period.

5. That the continued use by the County of the premises for courthouse and jail purposes for 27 years and the care of the trees and grounds for a like period constituted full compliance with the conditions of the deed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The property involved is located in Oklahoma and the contract embodied in the deed was executed and was to be performed in Oklahoma. Therefore, the interpretation and enforcement of that contract and the rights of the parties under it are governed by the laws of Oklahoma, both procedural and substantive, as found in its Statutes and the decisions of its highest court. The sole reason for the allowance of the writ is that the Court of Appeals decided the case upon all of the grounds set forth in its decision contrary to the Laws of Oklahoma, including sections 7 and 15 of Article II of the Constitution of the State of Oklahoma, and also contrary to the due process clause in the Fourteenth Amendment to the Constitution of the United States. In support of the reasons stated, the grounds of the decision and the governing laws of Oklahoma are specifically set forth as follows:

1. The holding that the trial court erred in receiving parol evidence to aid in construing conditions in the deed, notwithstanding the agreement of the parties upon the trial that such evidence should be received, is contrary to the decisions of the Supreme Court of Oklahoma in *Hutchins* v. *Richardson*, 100 Okla. 80, 227 Pac. 432; *Allen* v. *Oklahoma State Bank*, 133 Okla. 14, 270 Pac. 838; *Skaggs* v. *Gypsy Oil Co.*, 169 Okla. 209, 36 Pac. (2d) 865; *Banta* v. *Hestand*, 181 Okla. 551, 75 Pac. (2d) 415; *Taliferro* v. *Reirdon*, 186 Okla. 607, 99 Pac. (2d) 500; and *Hampton* v. *Kessler*, 193 Okla. 619, 145 Pac. (2d) 955.

2. The holding that Russell's testimony as to his intention in executing the deed and his understanding of

the meaning of the language used was no evidence of its meaning and had no probative value, even if it had been properly received, is contrary to the decisions of the Supreme Court of Oklahoma in *Richardson* v. *Chatfield,* 36 Okla. 700, 129 Pac. 728; *Rogers* v. *Kinney,* 122 Okla. 73, 250 Pac. 890; *Wilson* v. *Olsen,* 167 Okla. 527, 30 Pac. (2d) 710; *Hampton* v. *Kessler,* 193 Okla. 619, 145 Pac. (2d) 955; and *First National Bank and Trust Co.* v. *Bohanon's Heirs,* 199 Okla. 665, 189 Pac. (2d) 612.

3. The holding that the trial court erred in holding that the deed required the County to use the premises continuously for courthouse purposes and to care for the trees and grounds continuously without time limit and that its failure at any time to do so was a breach of the conditions in the deed is contrary to Section 3705 of the Oklahoma Statutes of 1893, being Section 4033 of the Statutes of 1903 and Section 29 of Title 60, O. S. A. (See Appendix), and is contrary to the decisions of the Supreme Court of Oklahoma in *Jordan* v. *Goldman,* 1 Okla. 406, 453, 34 Pac. 371; *Priddy* v. *School District,* 92 Okla. 254, 219 Pac. 141; *Union Missionary Baptist Church* v. *Fyke,* 179 Okla. 102, 64 Pac. (2d) 1203; *Locke* v. *Union Graded School District,* 185 Okla. 471, 94 Pac. (2d) 547; *Keaton* v. *Oklahoma City,* 187 Okla. 593, 102 Pac. (2d) 938; *Noble* v. *City of Oklahoma City,* 191 Okla. 20, 127 Pac. (2d) 843; *Oklahoma City* v. *Local Federal Savings and Loan Association,* 192 Okla. 188, 134 Pac. (2d) 565; *Jones* v. *Oklahoma City,* 193 Okla. 637, 145 Pac. (2d) 971; *Fuhr* v. *Oklahoma City,* 194 Okla. 482, 153 Pac. (2d) 115; and *Oklahoma City* v. *Wainwright,* 199 Okla. 470, 187 Pac. (2d) 226, and is also contrary to the

decision of the Supreme Court of the United States in *Noble* v. *City of Oklahoma City,* 297 U. S. 481.

4. The holding that the deed was not ambiguous and, notwithstanding the parties had agreed that it was ambiguous, that it merely required the County to erect a courthouse and jail within the time stipulated and to plant and care for the trees for the same period is contrary to the Oklahoma Statute and decisions of the Supreme Court of Oklahoma cited and listed in the preceding paragraphs numbered 1, 2 and 3.

5. The holding that the continued use by the County of the premises for courthouse and jail purposes for twenty-seven years and the care of the trees and grounds for the same period constituted full compliance with and extinguished the conditions of the deed is contrary to the Statute of Oklahoma and the decisions of its Supreme Court cited in the preceding paragraphs numbered 1, 2 and 3, and is also contrary to *Sections 7 and 15 of Article II of the Constitution of the State of Oklahoma,* and to the provision that no person shall be deprived of his property without due process of law in the *Fourteenth Amendment to the Constitution of the United States.*

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals, Tenth Circuit, at Denver, Colorado, commanding said court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings which said court had in Case No. 3742 entitled *The Board of County Commissioners of Oklahoma County, Oklahoma, Appellant* v. *Clarence O.*

Russell and Ruby Russell, Appellees, to the end that said cause may be reviewed and determined by this Court, as provided by its rules and the Statutes of the United States and that the judgment of said United States Court of Appeals in said cause be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this 20th day of June, 1949.

CLARENCE O. RUSSELL,
RUBY RUSSELL,
Petitioners,

By: CHAS. H. GARNETT,
608 Hales Building,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

No. .....

Supreme Court of the United States

OCTOBER TERM, 1948

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

DECISIONS OF THE COURTS BELOW

The opinion, findings and judgment of the District Court below is not officially reported. It appears at pages 26 to 32 of the Record.

The opinion of the Court of Appeals below is not reported, but appears at pages 151 to 160 of the Record.

II.

JURISDICTION

1. The date of the judgment to be reviewed is May 6, 1949 (R. 160). The Opinion of the Court was handed down on the same day (R. 151).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction is Title 28, United States Code, Section 1254.

3. The case is one involving purely questions of local law of the State of Oklahoma, as set forth in the statement of the grounds relied on for issuance of the writ in the petition filed herein. The decision of the court below is in conflict with and contrary to the laws of Oklahoma as declared in its Constitution and statutes and the decisions of its highest court. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term and among the number of such cases in which the writ has been granted are the following, which are believed to sustain this Court's jurisdiction here:

—*Erie R. Co.* v. *Tomkins*, 304 U. S. 64;

Guaranty Trust Co. v. *York*, 326 U. S. 99;

Williams v. *Green Bay & W. R. Co.*, 326 U. S. 549.

4. The Petition for the writ is presented under Rule 8, Paragraph 5(b), of the Revised Rules of this Court as amended to May 17, 1948. It is believed that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable and controlling local court decisions and with local constitutional and statutory law and also probably in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

III.

STATEMENT OF CASE

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed Record, has been made in the Petition for the Writ herein, and such statement is hereby adopted and made a part of this brief.

IV.

ASSIGNMENT OF ERRORS

The petitioners make the following assignment of errors committed in the opinion and decision of the Court of Appeals:

1. The Court of Appeals erred in not ascertaining, considering and applying the law of the State of Oklahoma in its decision.

2. The Court of Appeals erred in holding that the trial court erred in receiving parol evidence to aid in construing the conditions and language of the deed.

3. The Court of Appeals erred in holding that Russell's testimony as to his intention in executing the deed and his understanding of the meaning of the language used was no evidence of its meaning and had no probative value.

4. The Court of Appeals erred in holding that the deed did not require the County to use the premises continuously for courthouse purposes and to care for the trees

and grounds continuously without time limit and that its failure to do so was not a breach of the conditions in the deed.

5. The Court of appeals erred in holding that the deed was not ambiguous and notwithstanding the parties had agreed that it was ambiguous, that it merely required the County to erect a courthouse and jail within the time stipulated and to plant and care for the trees and ground for the same period.

6. The Court of Appeals erred in holding that the use by the County of the premises for 27 years and the planting and care of the trees and grounds for the same period constituted full compliance with and extinguished the conditions of the deed.

7. The Court of Appeals erred in not affirming the judgment of the court below.

V.

ARGUMENT

Synopsis of Argument

In support of the errors assigned the petitioners assert and rely on the following propositions which will be presented in order:

I.

This case is governed by the Law of Oklahoma, both procedural and substantive, and, in so far as applicable, by the Constitution of the United States.

II.

Under Oklahoma law the controlling consideration in the interpretation of a deed is the intent of the parties, and particularly of the grantor, to be ascertained from the language used in so far as possible, and every word, clause and expression in it is to be given meaning and effect, if this can reasonably be done, and, if it is ambiguous, resort may be had to extraneous evidence to resolve the ambiguity.

III.

Under the law generally, and under Oklahoma law specifically, where a party to a lawsuit involving the interpretation of a deed agrees upon the trial that it is ambiguous and asks and receives permission to introduce extraneous evidence to aid in its interpretation, he cannot change his position on appeal and complain that the trial court erred in receiving and relying on such evidence.

IV.

The conditions of the deed for erecting a courthouse and jail were timely complied with, but there was no time limit on the conditions for use of the courthouse for court purposes and the care of the trees and ground and under Oklahoma law these were continuing conditions and could not be deemed fully performed and extinguished by the lapse of time.

V.

Under Oklahoma law findings by the trial court on issues of fact and on mixed issues of law and fact in a law action are conclusive on appeal, if there is any evidence reasonably sufficient to support them.

VI.

The holding of the Court of Appeals that compliance with the conditions of the deed for more than 27 years constituted full compliance with those conditions and extinguished them is purely arbitrary, is not supported by the cases it cites, is contrary to the law of Oklahoma and probably violates the due process of law provision of the Fourteenth Amendment to the Constitution of the United States.

Proposition I.

This case is governed by the law of Oklahoma, both procedural and substantive, and, in so far as applicable, by the Constitution of the United States.

The deed involved is a bilateral contract by which the grantee, in consideration of the grant, contracted and agreed that upon its failure to keep and perform the conditions contained in such contract, the grant would become null and void and its estate and title would revert to the grantors upon payment made by them as therein provided. *Oklahoma City* v. *Local Federal Savings and Loan Ass'n*, 192 Okla. 188, 192, 134 Pac. (2d) 565. It was made and was to be performed in Oklahoma and the subject matter of it was real property in Oklahoma and hence it is governed by the law of Oklahoma. The law of real property in Oklahoma is fixed by statute. *Sec. 21, Title 60, O. S. A.; Knight* v. *Kimble*, 99 Okla. 48, 49, 225 Pac. 909; *Kassner* v. *Alexander Drug Co.*, 194 Okla. 36, 39, 197 Pac. (2d) 979. The instant action was at law in ejectment to try title and recover possession of the land (R. 27).

Jurisdiction of the Federal Court was based entirely on diversity of citizenship, and it was its duty in deciding the case to ascertain and apply the law of Oklahoma as found in its Constitution and statutes and the decisions of its highest Court. *Erie R. Co.* v. *Tomkins*, 304 U. S. 64, 78; *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 226-227; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108; *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 545, 553; *Angel* v. *Bullington*, 330 U. S. 183, 192.

In *Guaranty Trust Co.* v. *York*, *supra*, this Court said:

> "A federal court adjudicating a state-created right solely because of the diversity of the citizenship of the parties is for that purpose, in effect, only another court of the State."

In its decision the only reference by the Court of Appeals to Oklahoma law is the citation of the case of *Stinson* v. *Okla. Ry. Co.*, 190 Okla. 624, 126 Pac. (2d) 260, to the effect that the law is opposed to forfeitures, and that conditions subsequent are not to be raised by inference or implication. The grant in that case contained no words of forfeiture but merely a covenant as to use, and the rule there stated could not apply in this case where the grant was made on express conditions with an express provision for reversion of the property upon breach of any of its conditions. The Court ignored the applicable and controlling cases of *Ross* v. *Sanderson*, 63 Okla. 73, 162 Pac. 709; *Oklahoma City* v. *Local Federal Savings & Loan Ass'n*, 192 Okla. 188, 134 Pac. (2d) 565; and other similar decisions of the Supreme Court of Oklahoma hereinafter cited. Instead, it cited five cases from other jurisdictions, none of which were in harmony with Oklahoma law, and

one of which by an intermediate appellate state court was reversed by the Supreme Court of that state, and another of which is evidently a miscitation, for it has not the remotest relation to any question in the instant case. These cases will be again referred to herein.

Proposition II.

Under Oklahoma law the controlling consideration in the interpretation of a deed is the intent of the parties, and particularly of the grantor, to be ascertained from the language used insofar as possible, and every word, clause and expression in it is to be given meaning and effect, if this can reasonably be done, and, if it is ambiguous, resort may be had to extraneous evidence to resolve the ambiguity.

By Oklahoma statute, the Supreme Court is required to prepare a syllabus of the points of law decided in any case before it. Section 977 of Title 12, O. S. A., provides as follows:

> "A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the Justice delivering the opinion of the court, * * * which shall be to points of law arising from the facts in the case, that have been determined by the court."

Under this statute it is held in *Corbin* v. *Wilkinson*, 175 Okla. 247, 52 Pac. (2d) 45, that the law adopted by the Court is declared in the syllabus and that the Court's reasoning in the body of the decision is merely an aid to the correct interpretation of the law as announced in the syllabus. To the same effect is *Chevrolet Automobile* v. *State ex rel. Cline*, 192 Okla. 555, 136 Pac. (2d) 395. This

Oklahoma rule is mentioned here because frequently in presenting authorities, the syllabus only is quoted or referred to.

In *Ramey* v. *Stephney*, 70 Okla. 87, 173 Pac. 72, the Court held:

> "A cardinal rule of construction is that a grant must be construed to effect the plain intent of the grantor, and if that intent is plain it controls, regardless of inconsistent clauses which are to be reconciled with the intent deduced from the entire instrument."

In *Voss* v. *Thompson*, 105 Okla. 238, 232 Pac. 392, the Court held:

> "A cardinal rule for construing deeds is that the grant must be construed to effect the plain intent of the grantor, and if that intent is plain in the deed, it controls."

In *Wilson* v. *Olsen*, 167 Okla. 527, 30 Pac. (2d) 710, the Court quotes with approval from 18 C. J. 258, as follows:

> "Some meaning should be given to every clause, word and expression, if it can reasonably be done and is not inconsistent with the general intent of the whole instrument, so that the deed may operate * * * according to the intention of the parties."

In *Hampton* v. *Kessler*, 193 Okla. 619, 620, 145 Pac. (2d) 955, the Court said:

> "In construing a deed of doubtful meaning, the first duty of a court is to ascertain the intention of the parties, particularly that of the grantor (*Trumbla* v. *State*, 191 Okla. 119, 126 P. 2d 1015; *Wilson* v. *Olsen*, 167 Okla. 527, 30 P. 2d 710; *Burns* v. *Bastien*, 174 Okla.

> 40, 50 P. 2d 377; 26 C. J. S. 324 § 83), and in doing so the court should place themselves as nearly as possible in the position of the parties when the deed was executed. 16 Am. Jur. 531, § 168. The rule urged by the defendant that the deed will be construed most strongly against the grantor (16 Am. Jur. 530, § 165), and the rule urged by the plaintiff that a deed will be construed most strongly against the one drawing the deed (26 C. J. S. 322), are subordinate to the rule of intention first above mentioned."

To the same effect are *Rogers* v. *Kinney,* 122 Okla. 73, 250 Pac. 890; *Gardner* v. *Jones,* 198 Okla. 691, 693, 181 Pac. (2d) 838, 840; and *Paschall* v. *Royalties, Inc.,* 198 Okla. 646, 649, 181 Pac. (2d) 558, 561.

It was agreed by both parties that the deed here involved was ambiguous in some respects and both desired to introduce evidence to resolve the ambiguity (R. 41-42).

In the early case of *Richardson* v. *Chatfield,* 36 Okla. 700, 129 Pac. 728, the Court held that:

> "If a written contract is ambiguous or obscure in its terms, so that the contractural intention of the parties cannot be understood from its inspection, extrinsic evidence of the subject-matter of the contract, of the relation of the parties to each other, and of the facts and circumstances surrounding them at the time of its execution, may be received to aid the court in the proper interpretation of the instrument."

This holding has been approved verbatim in several subsequent decisions of the Oklahoma Supreme Court.

In *Gardner* v. *Jones,* 198 Okla. 691, 181 Pac. (2d) 838, 840, the Court quoted with approval from *Rogers* v. *Kinney,* 122 Okla. 73, 250 Pac. 890, as follows:

"If the intention of the parties to the deed is plain, parol evidence is not admissible to prove an intention different from the terms of the deed, but where a deed shows an element of uncertainty, parol evidence, the admission of the parties, and other extraneous circumstances may be proved to ascertain its true meaning."

In the very recent case of *First National Bank and Trust Co.* v. *Heirs of Bohanon*, 199 Okla. 665, 189 Pac. (2d) 612, the Court held:

"Where a deed is uncertain as to the intention of the parties, parol evidence, admission of the parties, and other extraneous circumstances may be proved to ascertain its true meaning."

Under the foregoing authorities the problem in the instant case was for the Court to ascertain and give to the language of the deed the meaning the grantor intended it to have.

The grant is subject to the *following conditions*—not one condition, but plural conditions. All that follows that language are conditions of the grant. There are four of these.

1. That the grantee shall "have erected on said ground herein conveyed a courthouse and jail",

2. "To be used for court and jail purposes for said county",

3. That the grantee shall "plant good healthy shade trees to ornament said ground",

4. And "make sufficient appropriation each year to procure proper care to be taken of such trees and ground, so that said trees shall live in a healthy condition".

These several conditions are connected by the word "and". Grammatically and logically they are a collective unit. If they are not all performed, "then and in that event this grant shall be null and void, etc." Thus the plural "conditions" as a collective whole and the singular "in that event" constitute a precisely correct grammatical sentence. The breach of any one condition would make the property subject to reversion, but the breach of any one or more might be waived without impairing the right of the grantor to enforce a reversion upon the subsequent breach of any remaining one.

There is no time limit on the condition for the use of the building for court purposes nor on the condition that the grantee shall "make a sufficient appropriation each year to procure proper care to be taken of such trees and grounds." Both of those conditions are continuing conditions to be kept indefinitely, and if and when broken, the title would revert. Surely the expression "each year" means just that. The continuing character of this condition year after year would not be made stronger if the language had been in "each year forever."

The apparent ambiguity in the deed was whether the requirement that the courthouse was "to be used for court purposes" was a condition of the grant and whether the condition in respect of such use and for the care of the trees and grounds were continuing conditions. On this, by agreement of the parties, extraneous evidence was introduced which definitely established, and from which the trial court found, that the use of the property for court purposes was a condition of the grant and that such use and the care of the trees were continuing conditions, and if and when they were broken, the title would revert.

Proposition III.

Under the law generally, and under Oklahoma law specifically, where a party to a lawsuit involving the interpretation of a deed agrees upon the trial that it is ambiguous and asks and receives permission to introduce extraneous evidence to aid in its interpretation, he cannot change his position on appeal and complain that the trial court erred in receiving and relying on such evidence.

In the instant case, counsel for the defendant, upon the trial, stated to the court that he considered the deed ambiguous and that "It may require other evidence to set forth the intention of the parties" (R. 40). The Court of Appeals said that the deed was not ambiguous and that the trial court erred in receiving other evidence to set forth the intention of the parties and that the testimony of Russell was erroneously received and was without probative value.

In 3 Am. Jur. 327, it is said:

> "The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of a ruling which he has invited the trial court to make."

Something like 200 cases are cited in support of this text and the Supreme Court of Oklahoma has frequently applied the rule.

In *Banta* v. *Hestand*, 181 Okla. 551, 75 Pac. (2d) 415, the Court held:

> "A party, on appeal to the Supreme Court, will not be permitted to secure a reversal of a judgment upon error which he has invited and acquiesced in."

In *Taliaferro* v. *Reirdon,* 186 Okla. 607, 99 Pac. (2d) 500, the Court held:

"A party may not obtain reversal of a judgment on error which he has invited or acquiesced in, or assume a position on appeal inconsistent with that taken in the trial court."

In *Knox* v. *Eason Oil Co.,* 190 Okla. 627, 126 Pac. (2d) 247, the Court held:

"A party may not try his case on one theory in the trial court and then change in the Supreme Court and secure a reversal upon another theory."

In *Hampton* v. *Kessler,* 193 Okla. 619, 145 Pac. (2d) 955, the Court held:

"Where parties have tried a quiet title action on the theory that a certain deed is ambiguous, the appellant will not be heard to urge on appeal that the deed is not ambiguous."

In the opinion in this case the Court said:

"Both parties now assert that there is no ambiguity in the description, but they both introduced evidence as to what was intended, and they tried the case on the theory that the description is ambiguous. The defendant, appellant here, will not now be permitted to change her theory and be heard to contend that the description is free from ambiguity and thereby secure a reversal. *Knox* v. *Eason Oil Co.,* 190 Okla. 627, 126 P. 2d 247. We will, therefore, dispose of the case on the theory that the description is ambiguous and susceptible of explanation by parol and other documentary evidence."

Under the foregoing authorities, it was error for the Court of Appeals to hold, as it did, that the deed was not ambiguous; that the defendant was not bound by its agreement on the trial that the deed was ambiguous and the court should receive extraneous evidence to aid in its interpretation; and that the trial court erred in receiving and giving weight and effect to the testimony of Russell, setting forth his understanding of the ambiguous part of the deed and his intention in its execution.

Proposition IV.

The conditions of the deed for erecting a courthouse and jail were timely complied with, but there was no time limit on the conditions for use of the courthouse for court purposes and the care of the trees and ground and under Oklahoma law these were continuing conditions and could not be deemed fully performed and extinguished by the lapse of time.

The deed involved contains a time limit on the erection of the courthouse and jail and planting of the trees. The parties agreed that these were timely and sufficiently complied with (R. 13). Although the jail was not erected on the land conveyed and the courthouse only partly thereon, this was treated by both parties as sufficient compliance with the condition for the erection of those structures, and the defendant so alleged in its answer (See page 4, *supra*). Having so alleged, the defendant is bound thereby and cannot make any claim to the contrary and apparently does not attempt to do so.

In *Bank of Buchanan County* v. *Priestly*, 87 Okla. 62, 209 Pac. 412, the Court said:

"Pleadings in a civil case are not merely matters of form, but they are solemn declarations of the parties. They present to the court what the pleader claims the facts to be and upon such statement asks it to grant him relief, and he is bound by every statement against his interest made therein and will not be heard to question the correctness thereof so long as they remain a part of the record; and they may be taken advantage of by the adverse party at any stage of the case, either in the trial court or on appeal, if they are preserved in the transcript or case-made."

In *Rider* v. *State ex rel. Shull*, 170 Okla. 630, 41 Pac. (2d) 484, the Court said:

"It is fundamental that admissions of fact in pleadings are judicially established. *Lee* v. *Little*, 81 Okla. 168, 197 P. 449. It is also a necessary adjunct to orderly trial, and to the preservation of the parties' rights, that no material variance shall be permitted from the issues drawn by the pleadings" (Citing cases).

This holding has been many times repeated by the Supreme Court of Oklahoma, but there is no need to cite further cases here.

No time limit is fixed upon the conditions for the use of the courthouse and the care of the trees and grounds. These are continuing conditions to be complied with indefinitely and they cannot be extinguished by the lapse of time.

In *Ross* v. *Sanderson*, 63 Okla. 73, 162 Pac. 709, the Court held:

"Notwithstanding its abhorrence of forfeitures, a court of equity will take jurisdiction, not to declare a

forfeiture, but to quiet a title already forfeited for nonperformance of a condition subsequent, when the plain language of the instrument shows that it was the purpose of the parties to declare that a breach should operate as a forfeiture.

"Where a condition subsequent is raised by apt and sufficient words, the estate conveyed remains defeasible until the condition be performed, destroyed, or barred by the statute of limitation, or by estoppel.

"By the weight of authority, an action may be maintained possessory or otherwise, upon the breach of a condition subsequent, without re-entry, demand for possession, or notice of forfeiture; the commencement of an action being deemed equivalent thereto.

"Generally, the breach of a condition subsequent may be waived by acts showing an intention to continue the estate in the grantee, but no waiver is occasioned by mere indulgence, or mere silent acquiescence, where it does not appear that the grantee understood there was a waiver, or that he relied thereon in proceeding to do the act claimed to operate as a forfeiture."

This holding is repeated verbatim in *Sanderson* v. *Dee*, 67 Okla. 73, 168 Pac. 1009.

The Oklahoma Supreme Court has never held that compliance with the conditions of a grant for any length of time, however great, extinguished those conditions. In *Jordan* v. *Goldman*, 1 Okla. 406, 34 Pac. 371, at pages 449, 450 and 453 of the Oklahoma Report, it is held that after the conditions of a treaty with the Cherokee Nation and of a patent conveying land to such Nation on condition subsequent had been complied with for 60 years the conditions had not been performed and destroyed by the lapse

of that length of time, and that if and when they were broken the title would revert to the United States. This case has been cited and its holding followed in *Union Missionary Baptist Church* v. *Fyke*, 179 Okla. 102, 104, 64 Pac. (2d) 1203, and in *Oklahoma City* v. *Local Federal Savings and Loan Ass'n*, 192 Okla. 188, 196, 134 Pac. (2d) 565.

In *Priddy* v. *School Dist.*, 92 Okla. 254, 219 Pac. 141, the Court held that in a grant of a fee on condition subsequent the conditions of the deed were still effective after 16 years.

In *Magnolia Petroleum Co.* v. *Suits* (C. C. A. 10), 40 Fed. (2d) 161, a case where Federal jurisdiction depended solely on diversity of citizenship, the Court applied Oklahoma law and held that a deed conveying property for the erection and maintenance of a church building, with a condition that if the property ever ceased to be used for such purposes, this "deed shall become void and the title to said premises shall revert to the grantors herein, their heirs or assigns" was effective after the lapse of over 20 years.

In *Union Missionary Baptist Church* v. *Fyke*, *supra*, page 103, it was contended:

> "That by the deed the church obtained a determinable fee to the plot of ground involved; that the condition inserted in the deed granted a qualified or determinable fee, and that inasmuch as a church had been erected and maintained thereon, the fee title was vested in the church, and the right to lease the land for oil and gas and retain the royalty accumulating under the lease follows as a matter of law, and that such use of the land was not an improper one."

The deed involved was the same one that was construed in *Magnolia Petroleum Company* v. *Suits, supra.* The Oklahoma Court denied the above contention and held that the conditions of the deed were still effective after a lapse of over 20 years.

In *Locke* v. *Union School Dist.*, 185 Okla. 471, 94 Pac. (2d) 547, the deed involved conveyed a tract of land for the use and purpose of a school site and campus ground with the express provision that when it ceased to be used for such purpose, the title to it would revert. After the lapse of 20 years an action was brought by the holder of the estate in reversion to recover the land for breach of the conditions. The trial court held on the facts that the condition of the deed had not been broken, but went further and rendered a judgment cancelling the reverter clause in the deed and permanently enjoining any future attack on the school district title. The Supreme Court of Oklahoma reversed that holding of the trial court and said:

> "Of course, the school district title is only the title conveyed by the original deed in 1914, and the title was and is yet burdened with the provision that the land was conveyed for specific use and would revert in case of abandonment and cessation of the use of the premises for the specified purposes. Therefore, it would not be correct to decree fee-simple title in the school district and to permanently bar and enjoin attack on that title."

In *Noble* v. *City of Oklahoma City*, 191 Okla. 20, 127 Pac. (2d) 843; *Oklahoma City* v. *Local Federal Savings and Loan Ass'n*, 192 Okla. 188, 134 Pac. (2d) 565; *Jones* v. *Oklahoma City*, 193 Okla. 637, 145 Pac. (2d) 971; *Fuhr* v.

Oklahoma City, 194 Okla. 482, 153 Pac. (2d) 115; and *Oklahoma City* v. *Wainwright*, 199 Okla. 470, 187 Pac. (2d) 226, the Supreme Court held that where land was granted in 1891 to a railroad company for use for railroad purposes with an express provision that in the event it ceased to be used for such purposes, it would revert to the grantors, their heirs or assigns, the condition was effective after compliance with it by the railroad company for 39 years, and that when abandoned for such purposes on December 4, 1930, the title to the land reverted to the original grantors or those claiming under them.

These decisions sufficiently establish that under Oklahoma law where land is granted on condition and the compliance with such condition is not limited as to time, but is indefinite, there is no period, either fixed or variable, within which compliance with such condition will operate to constitute full performance of it and destroy it and vest the title in fee-simple absolute in the grantee. The Court of Appeals erred in disregarding such Oklahoma law and holding that the conditions of the deed in the instant case were fully complied with and were destroyed after the lapse of 27 years or more.

Proposition V.

Under Oklahoma law findings by the trial court on issues of fact and on mixed issues of law and fact in a law action are conclusive on appeal, if there is any evidence reasonably sufficient to support them.

In *Davy* v. *State ex rel.*, 130 Okla. 91, 265 Pac. 626, the Court held:

"In law actions, where questions of fact are submitted to the trial court, in the absence of a jury, the judgment of the trial court will not be disturbed where the same is reasonably supported by competent evidence."

In *North Carolina Mut. Life Ins. Co.* v. *White*, 130 Okla. 118, 265 Pac. 642, the Court held:

"Where disputed questions of fact are submitted to the trial court, in the absence of a jury, the finding and judgment of such trial court will not be disturbed on appeal if there is any competent evidence reasonably tending to support the same."

In *Adams* v. *Hansford*, 130 Okla. 155, 265 Pac. 762, the Court held:

"Where a case is tried to the Court and there is a conflict in the evidence on the issues joined, determination of the question of fact therein is for the court, and this court, on appeal, will not weigh the evidence or determine as to the credibility of the witnesses, that question being one for the trial court."

The foregoing holding has been declared in more than a hundred decisions by the Oklahoma Supreme Court, both before and after the above cases. Among recent ones are *Atlantic Refining Co.* v. *Fulsom*, 185 Okla. 357, 91 Pac. (2d) 758, in which the Court held:

"Where a jury is waived in an action of legal cognizance, the findings of the court are entitled to the same weight and consideration that would be given to a verdict of a jury, and if there is any evidence, including any reasonable inferences, tending to support the findings, the Supreme Court will not reverse for insufficient evidence."

And *Busboom* v. *Smith*, 199 Okla. 688, 191 Pac. (2d) 198, in which the above holding is repeated verbatim.

The same rule applies where the findings of the trial court are on a mixed question of law and fact. In *Reynolds* v. *Hill*, 43 Okla. 749, 143 Pac. 1155, the Court held:

> "Where there is a mixed question of law and fact and the court cannot so separate them as to determine where the error of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

The foregoing holding is adopted verbatim from *Marquez* v. *Frisbie*, 101 U. S. 473. The same rule is announced in *United States F. and G. Co.* v. *Woodson Co.* (C. C. A. 8), 145 Fed. 144.

It is also the law in Oklahoma that a court may not disregard the uncontradicted testimony of a witness which is reasonable and not inherently improbable and the witness is not impeached.

In *Fleming* v. *Drew*, 88 Okla. 160, 212 Pac. 306, the Court held:

> "When the evidence is uncontradicted, and not inherently improbable, either in itself, or when taken in connection with circumstances, the court is not at liberty to disregard it."

In *Hubbard Banking Co.* v. *Koetsch*, 105 Okla. 227, 231 Pac. 207, the Court held:

> "While the jury are the sole judges of the credibility of the witnesses, yet they will not be allowed capriciously to disregard the positive uncontradicted

and unimpeached testimony of witnesses, unless the physical facts or circumstances surrounding the transaction contradict the positive testimony or the positive testimony is inherently improbable."

In *Koehn* v. *Fluman*, 191 Okla. 71, 126 Pac. (2d) 1002, the Court held:

"The courts may not disregard uncontradicted testimony where the same is reasonable and not inherently improbable and the witnesses are not impeached."

In *Webb* v. *Aetna Cas. & Surety Co.*, 194 Okla. 30, 147 Pac. (2d) 169, the Court held:

"Where a plaintiff introduces evidence which is reasonable and not inherently improbable, and makes out a case for said plaintiff, and defendants introduce no evidence to refute the case so made, a verdict for plaintiff is properly directed."

Mr. Russell's testimony as to the meaning of the language of the deed and his intention in the use of such language is both reasonable and probable and was not contradicted and he was not impeached. It was the duty of the court to accept the testimony as true and render judgment accordingly.

Hence the trial court's findings of fact as to the breach of the conditions in the deed are abundantly supported by the evidence and are conclusive on review by the Court of Appeals.

Likewise the finding of the trial court on the mixed question of law and fact as to the interpretation of the conditions of the deed, based on the language of it and

the extraneous evidence introduced to aid in its interpretation, that "the grant was on the conditions (1) that the courthouse should be used continuously after its erection for courthouse purposes, and (2) that the defendant would in each year continuously after the planting of the trees, make an appropriation for their proper care", is conclusive on review by the Court of Appeals. This statement is based on the premise that the trial court rightly considered the extraneous evidence introduced to aid in the interpretation of the deed after the parties had agreed that it was ambiguous and that such evidence should be received.

It follows that the Court of Appeals, sitting as a State court, in holding that the trial court erred in receiving and relying on extraneous evidence in arriving at its findings of fact and that those findings are not supported by sufficient competent evidence, has decided a question of State law contrary to controlling decisions of the Supreme Court of Oklahoma.

Proposition VI.

The holding of the Court of Appeals that compliance with the conditions of the deed for more than 27 years constituted full compliance with those conditions and extinguished them is purely arbitrary, is not supported by the cases it cites, is contrary to the law of Oklahoma and probably violates the due process of law provision of the Fourteenth Amendment to the Constitution of the United States.

Section 29 of Title 60 O. S. A. reads as follows:

"The reversion is the residue of an estate left, by operation of law, in the grantor, or his successors, or in

the successors of a testator, commencing in possession on the termination of a particular estate granted or devised."

This statute was Section 4132 of the Statutes of 1890 and has come down to date unchanged in all subsequent revised and compiled statutes. It was in force in 1903 and under its provisions the plaintiffs had a vested property right in the residue estate left in them under their deed to Oklahoma County to commence in possession if and when the particular estate granted was determined.

Section 7 of Article II of the Oklahoma Constitution provides that:

"No person shall be deprived of * * * property without due process of law."

Section 15 of said Article II provides that:

"No * * * *ex post facto* law, nor any law impairing the obligation of contracts shall ever be passed."

The Fourteenth Amendment to the Constitution of the United States contains substantially the same restrictions on the power of any state.

The decision of the Court of Appeals in the instant case that after 27 years of compliance by the County with the conditions of the deed, those conditions are cancelled and destroyed is judicial legislation depriving the plaintiffs of their property without due process of law and impairing the obligation of their contract with the County. This for the reason that so long as the County complied with the conditions of the deed, the plaintiffs had no cause of

action and could assert no rights to the property against it. Then, when the County abandoned the property and for the first time they could assert a claim to the possession of it, the court says that their claim and their vested residue estate had already been destroyed by the lapse of time.

Certainly the Legislature could not, after 1903, enact a valid and constitutional law providing that in all previous grants of a fee on condition subsequent, if the grantee complied with the conditions of the grant for 27 years (or any other period), those conditions would be deemed fully performed and the whole title to the property would vest in the grantee in fee simple absolute. Can a court do what the Legislature could not do?

The situation is analogous to one where a party has a cause of action subject to a 6 years limitation, for example, and after 5 years have run, the Legislature enacts a statute reducing the limitation to 4 years and thus defeats such party's remedy for the enforcement of his cause of action. The courts say this cannot be done.

In *Patterson* v. *Rousney,* 58 Okla. 185, 159 Pac. 636, the Supreme Court of Oklahoma considers this question exhaustively and answers it in the negative. It says, at page 193, that:

> "If the statutes of limitation of Oklahoma Territory be held applicable to existing rights, contracts, and claims on the date of statehood, and be given a retrospective operation, the time thereby prescribed in many instances would already have expired, and thus the right of action thereon be destroyed. Such a construction would render the statutes inoperative and

unconstitutional as to such rights, contracts, or claims. *Murray* v. *Gibson*, 15 How. 426, 14 L. Ed. 757; *Sohn* v. *Waterson et al.*, 17 Wall. 596, 21 L. Ed. 737."

The rule is settled that under constitutional guaranties neither the Legislature nor the courts can deprive a party of all remedies for the enforcement of a right. In 12 Am. Jur. 13, it is said:

"While a remedy may be modified, it cannot be taken away, for a right to property necessarily implies a right to process of law to protect it."

In *Franklin* v. *Margay Oil Corp.*, 194 Okla. 519, 520, 153 Pac. (2d) 486, the Court held:

"A legislative act which undertakes or operates so as to reduce the interest of a remainderman in an estate devised to him which has become vested in such remainderman before the enactment of such statute, is not due process of law and violates the Constitution of the State of Oklahoma and of the United States."

In *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673, the rule that a State court could not take away all remedy of a person to enforce a property right is forcibly declared. At page 680 this Court said:

"The federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government."

And at page 682, it said:

"Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all

existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Numerous cases are cited in support of the foregoing text.

So the Court of Appeals, sitting as a state court in this case, could not say that the plaintiffs had by the lapse of 27 years, lost all right to enforce the conditions of the deed before those conditions were broken and before any cause of action for their breach arose and before they had any opportunity to enforce them. To do so would destroy all their rights under the deed to their estate in reversion in the land reserved to them by the deed before they could ever assert such rights. This is not permitted under either the State or the Federal Constitution, and if the court could say that the conditions of the deed were fully complied with and title in fee simple absolute vested in the grantee in 27 years, why could it not say in 20 years, or in 15 years, or even in 10 years. If it could do this, there would be no fixed rule for the duration of compliance with the conditions of a grant on condition subsequent before such conditions would be deemed complied with and the estate in reversion or remainder be destroyed, but each case would depend upon the discretion or whim of the court in which the holder of such estate would attempt to enforce his rights when the conditions were broken. This denies to him any remedy or redress for the protection of his vested property right.

The Oklahoma cases cited under Proposition IV, beginning with *Ross* v. *Sanderson*, on page 30, *supra*, established conclusively that there is no period, either fixed or variable, within which compliance with the conditions in a deed conveying a fee on condition subsequent will constitute full performance of those conditions and destroy them. Reference is made to those cases and they will not be repeated here.

The cases from other jurisdictions relied on by the Court of Appeals will now be considered.

In *Mead* v. *Ballard*, 74 U. S. 190, which arose in Wisconsin, the condition in the deed involved was that the Lawrence Institute of Wisconsin should be permanently located upon the land conveyed and on the failure of such location within a year from the date of the deed, the land should revert to the grantor, the court construed this language to mean that a *permanent location* of the Institute was the only condition of the deed, and that since the deed contained no provision for the continued use of the land for such Institute, the condition was fully performed when the location was actually made and the building erected within the time limited. In the opinion it is said:

> "That condition was, that a permanent location of the Institute on the land should be made between the date of the deed and the same day of the succeeding year. The location, then, whatever may have been its character, was something which could have been done and completed within one year. If it was done within that time, the plaintiff's right of reverter was gone. If it was not done within the year, he could refund the money and recover the land. His right, on whatever it depended, must have been complete on the 7th day

of September, 1848, for within that time the condition was to be performed."

The obvious distinction between that case and the instant one is that, in addition to the provision in the Russells' deed that a courthouse should be erected on or before January 1, 1910, there are the further conditions that if the grantee should fail to use the same for court purposes and should fail to provide annual care for the trees and ground, the title would revert. These conditions are not ones that could have been fully performed by January 1, 1910.

The case of *Texas and Pacific Railway Co.* v. *Marshall*, 136 U. S. 393, involved a contract by which the railroad company agreed for a stated consideration to permanently establish its eastern terminus and Texas offices at the City of Marshall. *There was no grant of any property on any condition.* The action was by the City of Marshall for an injunction to restrain the railway company from removing its terminus and offices. The Court of Appeals erroneously says that the action was instituted to forfeit on the grounds that the condition had been broken. This Court held that injunction would not lie and said:

"The exigencies of railroad business in the State of Texas may imperatively demand that those establishments, or some of them, should be removed to places other than the city of Marshall, and that this would be also required by the convenience of the public, in which case both the public convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual, that all of its business offices and business shall remain forever at Marsh-

all * * *. The injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand."

In the instant case the County was "at liberty to follow the course which its best interests and those of the public demand", but instead of an action for damages for the breach of a covenant, the land was to revert to the grantors upon breach of the conditions in the deed.

In *Whalen et al.* v. *Baltimore and O. R. Co.*, 75 Atl. 166, which arose in Maryland, a contract by the railway company to construct and maintain certain facilities for the convenience of the plaintiffs was involved. There was no grant of any property to the railroad company on condition that it would revert if the facilities were not maintained. The plaintiffs had previously brought an action against the railroad company for specific performance which had been denied. Then they brought the action for damages for breach of the covenant. The Court held that compliance with the covenant for the time stated in the opinion was substantial performance of the contract and the railroad company was not liable for damages. In both this case and the *Marshall* case and in the authorities cited in them, the reason for holding that a covenant to maintain railroad shops or depots or to furnish other facilities for the benefit of private parties is not enforcible, is because the railroad company is a public service corporation and it is against public policy that it should be required to perform such covenant when it would be detri-

mental to the interest of the public and that such a covenant need be complied with only "until the exigencies of its business, the convenience of the public, and the welfare of the railroad demand its removal."

In the instant case, Oklahoma County was not required by the conditions of the deed permanently to maintain its courthouse on the land granted or permanently to care for the trees and grounds, but it was free at any time that the exigencies of the County's business and the needs and the convenience of the public demanded to remove the Courthouse to another location, but the deed specifically provided that in such case the title would revert to the grantors in the manner set forth therein.

The case of *Romero* v. *Department of Public Works* (Calif. App.), 97 Pac. (2d) 871, which on the facts most nearly conforms to the instant case and which is cited, quoted at length and much relied on by the court below, was reversed by the Supreme Court of California in *Romero* v. *Department of Public Works*, 17 Calif. (2d) 189, 109 Pac. (2d) 662, on the precise point to which it is cited and quoted. The fact that that case was reversed by the Supreme Court of California was called to the attention of the court below in petitioners' brief, but notwithstanding that it was no longer the law in California, much less in Oklahoma, the court below quoted it with approval and followed it.

The case of *Dukes* v. *Cole* (Ind.), 28 N. E. 441, is cited with approval by the Court of Appeals, but this is evi-

dently a miscitation, for there is nothing in that case that has the remotest bearing on any question in the instant case.

The foregoing cases plainly show that the Court of Appeals has decided this case, in rather careless fashion, on its independent judgment on matters of general law and has not attempted to follow Oklahoma law.

CONCLUSION

The petitioners in this case are ordinary citizens of the State of California. The case is an ordinary one involving property rights. The only ground for asking for the writ is to vindicate and receive the benefit of the rule declared by this Court in *Erie R. Co.* v. *Tomkins, supra,* and cases following it, that where the jurisdicition of a Federal Court is based solely on diversity of citizenship, it sits as a State Court and must follow state law. The Federal Courts have in such cases for so long assumed that there is a body of common law outside of any particular state and "that Federal Courts have the power to use their judgment as to what the rules of common law are; and that in the Federal Courts 'the parties are entitled to an independent judgment on matters of general law' ", that from habit, and perhaps inadvertently, they disregard state law and decide such cases on their independent judgment. This is an appropriate case for this Court to take jurisdiction and again correct an inferior court for failure to follow the rule in *Erie R. Co.* v. *Tomkins.*

This Court has not hesitated to act to protect the personal rights of ordinary citizens. While the petitioners are

ordinary citizens, they have confidence that they can successfully petition the highest tribunal in the land to protect their property rights against unlawful invasion by inferior Federal Courts. They respectfully ask that the writ be granted.

Respectfully submitted,

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June, 1949.

APPENDIX

The following statutes are from Title 60, Oklahoma Statutes Annotated. They have all been in force since prior to 1903. Some of them are referred to in the Petition and Brief and all of them may be deemed pertinent.

Section 21. Real property within this State is governed by the law of this State, except where the title is in the United States.

Section 28. A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time, or otherwise, of a precedent estate, created at the same time.

Section 29. The reversion is the residue of an estate left, by operation of law, in the grantor, or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Section 30. When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Section 40. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

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No. [redacted] 141

Supreme Court of the United States

OCTOBER TERM, 1948.

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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July, 1949.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8750

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No. 888

Supreme Court of the United States

OCTOBER TERM, 1948

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In the Court of Appeals respondent contended that the judgment should be reversed because:

(1) The condition in the deed was void on its face;

(2) If not void, it was waived;

(3) The action was barred by limitations;

(4) If the condition was not void or waived, it was fully performed.

The Court of Appeals passed only upon the fourth contention, holding that the condition had been fully performed by the county's erection of the buildings within the time specified and its use of them for court purposes for more than 27 years. Since certiorari will not be granted

if the judgment of the Court of Appeals is correct for any reason, we shall briefly present all four of the grounds which we urged in that court.

I.

The condition was void because (1) the County Commissioners were without authority to make other than an outright and unconditional purchase, and (2) the condition was contrary to public policy.

County Commissioners can exercise only those powers expressly granted by law or those necessarily implied (*Tulsa St. Ry. Co.* v. *State,* 26 Okla. 559, 110 Pac. 373; *In re Assessment of First National Bank,* 64 Okla. 208, 166 Pac. 883).

They have no inherent powers, and those granted by law must be strictly construed, and their acts in excess thereof are void [*Hawks* v. *Hamill,* 228 U. S. 52; *State* v. *Board of Commissioners,* 188 Okla. 184, 107 Pac. (2d) 542; *Yocham* v. *Oklahoma County Election Board,* 198 Okla. 588, 180 Pac. (2d) 831].

All persons dealing with them are charged with knowledge of the limitations upon their powers, and must govern themselves accordingly [*Western Paint & Chemical Co.* v. *Board of Commissioners,* 161 Okla. 300, 18 Pac. (2d) 888; *Honnold* v. *Board of Commissioners,* 71 Okla. 71, 177 Pac. 71; *Graves* v. *Board of Commissioners,* 170 Okla. 282, 39 Pac. (2d) 532].

The authority of the Commissioners in 1903 to purchase or erect a courthouse or a jail was Sec. 1468, Rev. and Ann. Stat. of Okla. Ter. 1903, and was as follows:

"Whenever the Board of County Commissioners of any county in the Territory of Oklahoma considers it to be to the best interests of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same and to issue bonds in payment therefor."

Section 1229 of the same statutes, supplementing the authorization to purchase, provided that, "Any real or personal estate heretofore or which may be hereafter conveyed to any county shall be deemed the property of such county."

"The word 'purchase' connotes the transfer of ownership from a seller to a buyer" [*Replogle* v. *Indian T. I. O. Co.*, 193 Okla. 361, 367, 143 Pac. (2d) 1002]; and ordinarily the word, without more, means the acquisition of an absolute and unconditional title (*Camden & T R Co.* v. *Adams*, 62 N. J. Eq. 656, 51 Atl. 24). It meant that here, and not the acquisition of a defeasible estate which by forfeiture might entail upon the county the loss of the entire amount invested in the courthouse building and jail.

The Commissioners' powers, being strictly construed, were limited to doing the thing authorized and nothing else. In *State* v. *Allis*, 18 Ark. 269, the Court held that legislative authority to an agent to enter into a contract in the state's behalf granted only the power "to enter into a simple contract, and not a specialty or sealed contract." Here the Commissioners were authorized to make only a simple, straight-out purchase, and not a contract for the forfeiture of that which was purchased. The statute did not contemplate or intend that what was purchased should ever be forfeited.

The law is opposed to forfeitures, and conditions subsequent are not favored even as between private parties [*Stinson* v. *Oklahoma Ry. Co.*, 190 Okla. 624, 126 Pac. (2d) 260]. That being true, should a simple authority to County Commissioners "to purchase" for courthouse purposes be construed to authorize an agreement to which the law was opposed even as between individuals, an agreement for the forfeiture of that which was purchased? Is the law, without any words so indicating, to be construed to authorize an agreement to which it is opposed and which might defeat the very purpose of the act, namely, the county's acquisition of ownership?

Also, it is everywhere held that conditions subsequent cannot be created by inference or implication; they must be express and are strictly construed. Can authority to County Commissioners, whose powers are limited and are strictly construed, to bind the county by conditions subsequent, arise from mere inference or implication?

In *School Committee* v. *Kesler et al.*, 67 N. C. 443, the Court said:

> "The school committee, under its power to acquire suitable sites for school houses by purchase or donation, were not authorized to accept a site and erect schoolhouses thereon at the public expense, if the title to the land was clogged by any such condition or qualification. The condition or qualification being repugnant and inconsistent with the object of the grant, is void, and must be rejected, * * * ."

In *Rogers* v. *Sebastian County*, 21 Ark. 440, the Commissioners located the county seat at Fort Smith and determined to build a courthouse there, and Rogers conveyed

to them a site as a donation. Later it was determined to build the courthouse at another place, and Rogers sued to recover the land. The Court held that, under the statute, "the Commissioners had no power to receive any donation of land from Rogers with a reservation or limitation expressed in the deed; and, if so, they certainly had no right to attach a condition to Rogers' absolute deed by parol agreement"; that the location of the county seat or courthouse could not be made to depend upon a contract with Rogers; and that Rogers could not recover the land. It is true that in that case there was a statute requiring that the purchase be outright; but, if the words "to purchase" here under consideration also meant an outright purchase, the acquisition of an unconditional title, then the situation in the two cases is the same.

Also the condition was contrary to public policy. It was the intent of the law that counties should not be divested of their property otherwise than by an authorized sale thereof. The law required that the purchase be for cash. By Section 1421 a fund was to be accumulated for that purpose, and by Sections 1468-73, where there was no fund, bonds were to be issued. The property was not to be purchased on credit or condition. Nothing short of an express grant of power to purchase upon conditions that might result in the forfeiture of the property and the loss of the investment in the buildings could authorize the Commissioners to bind the county by such conditions. Illustrative of public policy in that respect are the facts (1) that County Commissioners have no power to mortgage the county's lands or buildings (*Stewart* v. *Otoe County*, 2 Neb. 177; *Vaughan* v. *Forsyth*, 118 N. C. 636, 24 S. E. 425).

(2) Statutes providing generally for mechanics' liens are interpreted as not being applicable to a county's property, and "for this reason there can be no mechanic's lien on a county courthouse or on county buildings." (Boisot on Mechanics' Liens, Sec. 208; 2 Jones on Liens, Sec. 1375; Bloom on Mechanics' Liens, Sec. 192; *Hutchinson* v. *Krueger,* 34 Okla. 23, 124 Pac. 591; *Western Terra Cotta Co.* v. *Board of Education,* 39 Okla. 716, 136 Pac. 595; *School District* v. *Graham,* 45 Okla. 531, 146 Pac. 213; *Gloyd* v. *Morris,* 42 Okla. 75, 140 Pac. 1149; *National Fireproofing Co.* v. *Town of Huntington,* 81 Conn. 632, 71 Atl. 911). (3) No judgment against a county becomes a lien upon any of its property (Sec. 1234, St. 1903). The reason is that a mortgage or a mechanic's or judgment lien, by foreclosure and sale, might divest the county of its lands and buildings, and that reason is applicable to a purchase upon condition that may entail a forfeiture.

Moreover, the establishment and change of county seats and the location and relocation of courthouses therein are governmental powers granted by law, to be exercised from time to time for the best interests of the county and the general public. And, as said by the Supreme Court of Arkansas in *Rogers* v. *Sebastian County,* 21 Ark. 440, those powers cannot be limited by contracts which may result in "fettering the free and legal action of the County Court (Commissioners) *or sacrificing the property of the county.*"

The Supreme Court of Indiana held likewise in *Armstrong et al.* v. *Board of Commissioners,* 4 Blackf. 208, saying that, "There is no authority given to the Commissioners to make the location dependent upon a contract, nor are they authorized to make a contract"; and further saying

that, "It is clear that the appellants, having personal knowledge of the act and the powers of the Commissioners, could not, if those powers were exceeded, avail themselves of a supposed benefit or right arising from an act by the Commissioners, itself an evident excess of the powers committed to them."

Since the Commissioners had no power to contract that the county seat or the location of the courthouse should never be changed, their authority to purchase was not authority to purchase upon conditions that would either destroy the county's governmental power of change to meet changed conditions, or else would require that it pay all that was invested in the land and the courthouse for the privilege of exercising its governmental power.

In *St. Louis, Jacksonville & Chicago Ry. Co.* v. *Mathers,* 71 Ill 592, the Legislature had chartered the railroad company and invested it with the power of eminent domain for the general welfare. Mathers conveyed to the railroad certain land on condition that no depot should be established within three miles of a certain town. Subsequently a depot was established in violation of the agreement, and Mathers sued to recover the land. The Court said:

> "The validity of a condition subsequent depends upon its being such as the law will allow to divest an estate, for if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. 1 Story's Equity, par. 288; 4 Kent's Coms. (8th Ed.) 134; 1 Washburn on Real Estate (2nd Ed.), 469."

Further on, the Court said:

"The alleged agreement or condition, on account of the non-performance of which relief is here sought, was, that a railroad company, chartered by an act of the legislature, and invested with the power of condemning private property, upon the ground that its road is for the public use, shall not establish a depot or station within three miles of Ashland. It can not be pretended, for a moment, that the board of directors had authority to make such an agreement or condition. They were trustees both for the public and the stockholders of the company, and in the discharge of their two-fold duty, were required to act with reference to the public convenience, on the one hand, and the private interests of the stockholders upon the other. Between these there was no conflict, for the greater the local conveniences for the use of the road by the public, the greater would be its local business, and, of consequence, the profits of the stockholders. The interests, therefore, both of the stockholders and the public, forbid that there should be a positive prohibition against the establishing of stations at any points on the line of the road. Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it."

And the Court held the condition void. Of course, the County Commissioners were as much trustees for the pubic as were the directors of the railroad, and as such were under a continuing duty to act in accordance with the best interests of the public, which might change from time to time,

and they could no more disable themselves by contract from doing so, or subject the county's property to forfeiture for doing so, than could the railroad in the above case.

It is submitted that the Commissioners had authority to make only an absolute and unconditional purchase and that the condition was void.

The Condition Being Void, the Deed Vested in the County an Absolute and Indefeasible Title to the Property.

Excepting the purported condition, the deed was in the usual form with a covenant of warranty. It conveyed an estate in fee simple purportedly terminable upon a condition subsequent [*Oklahoma City* v. *Local Federal Savings & Loan Association,* 192 Okla. 188, 134 Pac. (2d) 565].

From common law days until now, it has been the law that, if a condition subsequent in a deed which purports otherwise to convey a fee simple title is unlawful, contrary to public policy or otherwise void, or is or becomes impossible of performance, it will be rejected and the deed will pass an unconditional title in fee simple (Blackstone, bk. II, p. 156; 19 Am. Jur., Title "Estates", Sec. 77; 2 C. J. S., Title "Deeds", Sec. 146, p. 479).

II.

The condition was waived, and the trial court's judgment was based, not upon it, but upon another which the court itself formulated and substituted for it. That it had no power to do.

The law abhors forfeitures and does not look with favor upon conditions subsequent, for which reason they are construed with the utmost strictness, as the law books say,

"strictissimi juris" [*Stinson* v. *Oklahoma Ry. Co.*, 190 Okla. 624; *Columbia Ry. Etc. Co.* v. *South Carolina*, 261 U. S. 236, 248; *Oregon & Calif. Ry. Co.* v. *United States*, 238 U. S. 393; *Second Church of Christ* v. *LePrevost*, 67 Ohio App. 101, 35 N. E. (2d) 1015].

They cannot be created, proved or enlarged by parol, but must be clearly expressed in the deed. Nothing unexpressed is implied. What is expressed is strictly construed. And the evidence must bring the case squarely within the condition. No unexpressed condition can be added by parol, by implication, or by judicial construction [*Smith* v. *School District* (Ark.), 94 S. W. (2d) 706; *Peerless Carbon Black Co.*, v. *Gillispie*, 87 W. Va. 441, 105 S. E. 517; *Allen* v. *Trustees of Great Neck Free Church*, 269 N. Y. S. 341, 265 N. Y. 570, 193 N. E. 324; *Engel* v. *So. Penn. Oil Co.* (W. Va.), 146 S. E. 385; *Shields* v. *Harris*, 190 N. C. 520, 130 S. E. 189; *Petition of Copps Chapel M. E. Church*, 120 Ohio St. 309, 166 N. E. 218; *Toole* v. *Christ Church* (Tex.), 141 S. W. (2d) 720; *Gramer* v. *Sacramento* (Calif.), 41 Pac. (2d) 543; *Columbia Building Co.* v. *Cemetery of Holy Cross* (Md.), 141 Atl. 525; *Gladewater County Line Indp. School Dist.* v. *Hughes*, 59 S. W. (2d) 351, affirmed 76 S. W. (2d) 471].

Any ambiguity in the deed or defect in the evidence offered to show a breach will be taken most strongly against the grantor and in favor of the grantee [*Fitzgerald* v. *Modoc* (Calif.), 129 Pac. 794; *Ralston* v. *Hatfield* (Ind.), 143 N. E. 887; *Hitz* v. *Flower* (Ohio), 135 N. E. 450; *Columbia Gas & Elec. Co.* v. *South Carolina*, 261 U. S. 236; *Berger* v. *Santa Fe College* (N. Mex.), 215 Pac. 825].

The condition required that the court house and jail be "erected *on said ground herein conveyed,*" and that the trees be planted on "said ground" (4-5). The breach of the condition alleged was that respondent "never at any time erected a courthouse and/or a jail on said land, although it did erect a courthouse part of which was on said land, and in that it never did use any building erected on said land or any part thereof for jail purposes" (2).

Petitioner testified that before the jail was erected he knew that it was to be, not upon any land described in the deed, but upon other land which he himself conveyed to the county on October 17, 1905, by an unconditional deed (18) for a consideration of $1750 (106-107). He also testified that he lived in Oklahoma City when the courthouse was being erected and that he saw and knew that the greater part of it was being built upon other land, that he made no objection or protest, and that the location of the courthouse and jail was satisfactory to him (105-106, 108). Following that, he testified as follows:

Q. "Counsel asked you if you knew of the fact that the courthouse and jail were erected partly on your lots and partly on other lots? As a matter of fact, you waive any objection to the fact that the courthouse is only partly located on your lots and partly on other lots?

A. I make no objection now and never have.

Q. You make no objection now and never have?

A. No" (117-118).

The court's third finding of fact was as follows:

"Before January 1, 1910, the defendant erected a courthouse partly on the land described and partly on

adjoining land, and erected a jail on still other land. This breach of the conditions of the deed was known to the complainants at the time and was waived by them" (28).

We have, therefore, as petitioners contended and the court found, a condition subsequent that the respondent would erect "*on said ground herein conveyed* a courthouse and jail" on or before January 1, 1910; and we have that condition breached in 1904 and 1905 by the erection of a courthouse more than half of which was on land other than that conveyed and of the jail upon other ground entirely, which facts were fully known to petitioners at the time. Petitioners' standing by and seeing the county expend enormous sums in constructing the courthouse and jail upon other land than that described in the deed, without objection or protest, operated to waive the condition, and petitioners testified and the court found that they did waive it.

That waiver precluded the recovery of the land for failure to build a courthouse and jail upon it; and there is no contention or evidence that the county ever contracted with petitioners to substitute any other condition for the one that was expressed and waived. Petitioner testified that neither when the construction was commenced nor at any time while it was being carried on did he have any conversation with the County Commissioners about it, and that he made no objection to the location of the court house and jail (106). In fact, he sold the county by an unconditional warranty deed the land for the jail on October 17, 1905.

Petitioner's waiver, therefore, was a unilateral act, a waiver pure and simple, and was not a contract between

him and the county [*Strange* v. *United States*, 282 U. S. 270, 276; *Big Four Oil & Gas Co.* v. *Heiner*, 57 Fed. (2d) 29; *Bertelsen & Petersen Engineering Co.* v. *United States*, 60 Fed. (2d) 745, 747; *Schwartz* v. *Wilmer*, 90 Md. 136, 144, 44 Atl. 1059; *Clark* v. *Dye*, 158 Minn. 217; *Champion Spark Plug Co.* v. *Automobile Sundries Co.*, 273 Fed. 74, 79; *G. S. Johnson Co.* v. *Nevada Packard Mines Co.*, 272 Fed. 291, 305].

There is no evidence or contention that the county ever agreed that any other condition should be substituted for the waived condition stated in the deed. No agreement was alleged or proved to the effect that the alleged condition of perpetual use of the courthouse and jail to be erected upon the land conveyed should be transferred to and be applicable to a courthouse and jail erected, not upon that, but upon other land.

If the deed had been conditioned upon the county's perpetually maintaining the courthouse and jail upon the land conveyed, and it was not, that condition would have been waived by the waiver of the requirement that the courthouse and jail be erected upon that land. The waiver of their erection there would have waived a requirement that they be maintained there, for erection necessarily precedes maintenance. And, since the deed contained no provision relating to a courthouse and jail upon any other land, there was, of course, no requirement that a courthouse and jail upon other land be continuously maintained. In short, when petitioners waived the condition that the courthouse and jail be erected upon the land conveyed, they waived any requirement as to their maintenance anywhere, for

the condition related only to the courthouse and jail upon the land conveyed.

Contrary to the rule of strict construction, the court interpolated into the condition a provision it did not contain, namely, that, in addition to erecting the courthouse and jail "on said ground herein conveyed," the county should perpetually use the same for those purposes; and it applied that interpolated condition to a courthouse and jail not erected on the land "herein conveyed," to a courthouse and jail to which the condition did not relate. The condition with reference to the courthouse and jail "on said land herein conveyed" does not apply to a courthouse and jail on other land. Petitioner's waiver of the location of the courthouse and jail waived his right to retake the property upon the county's ceasing to maintain them at a different place from that specified in the deed. The waiver of those conditions waived all conditions, and the deed immediately became absolute. In *Dakin* v. *Williams*, 17 Wend. 447, a portion of the syllabus is as follows:

> "Where an estate is granted subject to a condition, and the grantee is released from the performance of a part thereof, the whole condition is gone, and the estate is wholly free and discharged of the condition."

A condition subsequent may be waived [*Pence* v. *Langdon*, 99 U. S. 578, 581; *Swain* v. *Seamens*, 9 Wall. 254, 274; *American Darigold Corp.* v. *Darigold Metals Corp.* (6 C. C. A.), 125 Fed. (2d) 446, 454; *First Federal Trust Co.* v. *First National Bank* (9 C. C. A.), 297 Fed. 353, 357; *Kansas City Life Ins. Co.* v. *Davis* (9 C. C. A.), 95 Fed. (2d) 952; *Pokegema Sugar Pine Co.* v. *Klamath River Co.* (C. C.), 96 Fed. 34, 54].

A condition once waived is wholly gone. The estate becomes absolute in the grantee, and cannot be divested by any subsequent breach [*Wilkes* v. *Groover*, 138 Ga. 407, 75 S. E. 353; *Chicago Sanitary Dist.* v. *Chicago Title & Trust Co.*, 278 Ill. 529, 116 N. E. 161; *Guild* v. *Richards*, 82 Mass. 309; *Rice* v. *Boston & W R Co.*, 94 Mass. 141; *Barrie* v. *Smith* (Mich.), 10 N. W. 168; *McCue* v. *Barrett* (Minn.), 109 N. W. 594; *Hebrew Orphan Asylum* v. *New York*, 270 N. Y. S. 310; *Schulman* v. *Ellenville Electric Co.*, 273 N. Y. S. 530; *Sharon Iron Co.* v. *Erie*, 41 Penn. 341; *Board of Education* v. *Baker*, 124 Tenn. 39, 134 S. W. 863].

III.

The action was barred by limitations.

The condition was that if respondent should "fail and neglect to have erected *on said ground herein conveyed* a courthouse and jail to be used for court and jail purposes for said county on or before the first day of January, 1910," then the property should revert. The courthouse and jail were not erected upon the land conveyed on or before January 1, 1910, or thereafter. That being true the condition stood broken on January 2, 1910, petitioners' right of re-entry and their cause of action to recover the land accrued, and Oklahoma's fifteen-year statute of limitation then and now in effect [Okla. Stat. 1941, Sec. 93(4)] commenced to run against them on that day, and had fully run on January 2, 1925. This action was not filed until April 9, 1946 (1-8), more than twenty-one years after it had become barred.

IV.

If the condition was not void, and was not waived, then it was fully performed.

The trial court construed the deed to require the perpetual use of the property for court purposes (28, 29 and 30). That is contrary to the unambiguous terms of the deed and to all the decisions upon the subject.

The deed was made for a valuable consideration passing to petitioners, as distinguished from a donation or deed of gift or a deed for a nominal consideration. That consideration was $4,000 in cash, and the assignment to petitioners of all the subscriptions for donations that had been made by the citizens (83), and the benefit that would accrue to petitioners from the building of the courthouse, they then owning other lots in the same block. In such cases, the courts lean still more strongly away from conditions that would create a forfeiture [*Toole* v. *Christ Church* (Tex.), 141 S. W. (2d) 720].

None of the words "permanent" or "permanently", "perpetual" or "perpetually" or "maintained" is to be found in the deed. The deed states that the property is granted "for the purpose of building a courthouse thereon"; but it is universally held that the statement in a deed of the purpose of the grant does not create or enlarge a condition subsequent, but that the condition itself must be stated in unambiguous language (*Avery* v. *United States,* 104 Fed. 711; *Scovill* v. *McMahon,* 62 Conn. 378, 26 Atl. 479; *Dunne* v. *Minsor,* 312 Ill. 333, 143 N. E. 842; *Rawson* v. *School District* 89 Mass. 125).

The statement in the deed, therefore, that it was made "for the purpose of building a courthouse thereon" did not constitute or enlarge the condition.

The condition was as follows:

> "That if the said grantee shall fail and neglect *to have erected* on said ground herein conveyed a courthouse and jail to be used for court and jail purposes for said county on or before the first day of January, 1910, and shall fail to plant good healthy shade trees to ornament said ground, and make sufficient appropriation each year to procure proper care to be taken of such trees and ground, so that said trees shall live in a healthy condition", then the property shall revert.

Leaving out of consideration for the present the change in the location of the courthouse and jail and petitioner's waiver, and considering the condition just as though the courthouse and jail had been built upon the land conveyed by petitioner, we say that the condition was fulfilled. The county did not fail to "have erected" a courthouse and jail to be used for court and jail purposes on or before the first day of January, 1910, or to plant and maintain good healthy shade trees. The deed contained no condition that the courthouse and jail should be used as such forever or for any certain time. It only required that they be "erected" on or before January 1, 1910, for court and jail purposes. That required that their erection be in good faith for such purposes; and when they were erected on or before January 1, 1910, with the good faith intention of using them for court and jail purposes, and their erection was followed by their use for such purposes for 33 years, and the trees were planted and cared for during the same period, the condition

was fulfilled, and petitioner was without right to retake the property upon the county's then ceasing to use it for court and jail purposes, or upon its ceasing to care for the trees.

The court's finding interpolates into the condition a provision that the county shall not only erect the courthouse and jail on or before January 1, 1910, but also that it shall use them for that purpose forever thereafter. There is no such provision in the deed nor anything like it. The condition is to be strictly construed, and that additional condition could not be created and cannot be proved by parol [*Thompson* v. *Thompson*, 9 Ind. 323; *Gadberry* v. *Sheppard*, 27 Miss. 203; *East Line & Red River Ry. Co.* v. *Garrett*, 52 Tex. 133; *Galveston H & S A RR Co.* v. *Pfeuffer & Ireland*, 56 Tex. 66; *Buszozak* v. *Wolo*„ 211 N. Y. S. 557; *Blewitt* v. *Boorum*, 142 N. Y. 357, 37 N. E. 119; *Hamlin* v. *Hamlin*, 192 N. Y. 164, 84 N. E. 805; *Stiebel* v. *Grosberg*, 202 N. Y. 266, 95 N. E. 692; *Lafayette Street Church Society* v. *Norton*, 202 N. Y. 379, 95 N. E. 819; *Rogers* v. *Sebastian County*, 21 Ark. 440; *Marshall County High School Co.* v. *Iowa Evangelical Synod*, 28 Iowa 360].

In *Dunbar* v. *Stickler et al.*, 45 Iowa 384, 386, the Court said:

> "Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed (in the absence of fraud, accident or mistake) to be the only condition, and if that condition is kept the title cannot be successfully assailed. To engraft upon the condition expressed in the deed another by parol would be to vary by parol the legal effect of the deed. That this cannot be allowed is substantially

held in *Isett et al.* v. *Lucas,* 17 Iowa 503. See also *Henderson* v. *Henderson,* 13 Mo. 152."

The courthouse was erected in 1904 and the jail in 1905. They were erected for court and jail purposes. They were substantial stone buildings, and, subject to the possibility that time and the city's growth and changed circumstances might otherwise require, they were intended for permanent use. They were so used continuously from 1904 until 1937, a period of 33 years, during which time the city increased in population from about 35,000 to nearly 300,000 people, the courthouse became wholly inadequate, its location inconvenient, and the building itself unsafe. When that happened, the people of the county changed the location and voted bonds to build a new one, in the exercise of power granted them by law.

A condition that the county should erect a courthouse and jail "to be used for court and jail purposes * * * on or before the first day of January, 1910", is not a condition that the building or the land be forever used for that purpose.

A case squarely in point is *Mead* v. *Ballard,* 74 U. S. 290. There lands were conveyed "upon the express understanding and condition" that a certain institute "shall be *permanently* located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money without interest, the said land shall revert to and become the property of said grantors." The buildings were located upon the land and were maintained up to 1857, about nine years, when they burned down and were never rebuilt, a larger

building being erected upon an adjoining tract. The grantor sued to recover the land. It will be observed that the condition in that case was stronger than in this one, as it provided that the institution should be "permanently" located upon the land on or before a certain date. The Court held that the condition in the deed was the permanent location of the building on or before September 7, 1848, and that when the trustees passed a resolution locating the building upon the land with the intention that it should be the permanent place of conducting the business of the institution, they had literally fulfilled the requirement of the deed, and that all right of reversion was ended.

If, in that case, we should substitute the word "erected" used in this deed for the word "located" used in that one, and the 1st day of January, 1910, for the 7th day of September, 1948, the situation in each case would be exactly the same. There the deed used the word "located". Here it used the word "erected". There the deed required that the location be permanent. Here the deed did not purport to require permanency. But this Court held that the word "permanently" did not mean that the land must forever thereafter be so used, but required only that the building be located with the good faith intention of using it permanently, and that when that was done, the condition was fulfilled and all right of reversion was at an end. It said that the thing to be done was something which could have been done and completed within the year terminating on September 7, 1848, and that if it was done within that time, the right of reverter was gone. Here the thing to be done was to be done "on or before the first day of January, 1910", and if it was done within that time, then all right

of reverter was gone. The words in the deed, "to be used for court and jail purposes", denote only purpose and not duration.

Another decision of this Court squarely in point is *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, which is quoted from in the decision of the Court of Appeals. Other cases holding likewise are:

—*Bryan* v. *Louisville & N. R. Co.* (8 C. C. A.), 244 Fed. 650;

Texas & Pacific R. Co. v. *Scott* (5 C. C. A.), 77 Fed. 726;

Berkley v. *Union Pacific Ry. Co.*, 33 Fed. 794;

Hunt v. *Beeson*, 18 Ind. 380;

Hasman v. *Elk Grove Union High School*, 76 Cal. App. 629, 245 Pac. 464;

Whalen et al. v. *Baltimore & Ohio R. Co.*, 112 Md. 187, 76 Atl. 166;

Higbee v. *Rodeman*, 129 Ind. 244, 28 N. E. 442;

Sumner et al. v. *Darnell*, 128 Ind. 38, 27 N. E. 162;

Jeffersonville, Madison & Indianapolis R. Co. v. *Barbour*, 89 Ind. 375;

Brooks et al. v. *Kimball County*, 127 Neb. 645, 256 N. W. 501;

Romero et al. v. *Dept. of Public Works* (Calif.), 97 Pac. (2d) 871;

O. T. Johnson Corp. v. *Pacific Elec. Ry. Co.* (Calif.), 65 Pac. (2d) 368;

Booth v. *Los Angeles County*, 124 Calif. App. 259, 12 Pac. (2d) 72.

The only thing that the deed required as to the courthouse and jail was their erection "on said ground", and the only time specified in the instrument is that within which the erection shall be made, and, leaving out the question of waiver, that condition was literally complied with. Where a deed conveys property upon a condition subsequent that a building be erected for a certain purpose within a certain time, and the building is erected within the time and is intended for the purpose stated, the condition has been fulfilled. There being no provision in the deed that the use should be perpetual, such provision could not be shown by parol. There was no obligation to maintain the use perpetually.

REPLY TO SOME OF PETITIONERS' CONTENTIONS

Petitioners say that the property was located in Oklahoma and that the deed was executed there, and that therefore the interpretation and enforcement of its provisions "are governed by the laws of Oklahoma, both procedural and substantive, as found in its statutes and the decisions of its highest court." We know of nothing in the statutes or decisions in Oklahoma, and petitioners have pointed out nothing, which militate against our contentions. But the petitioners are wrong in saying that the questions are determinable by the statutes and decisions of the State of Oklahoma. The deed was executed in 1903 while Oklahoma was a territory of the United States, deriving all its powers from its Organic Act (Act of Congress, May 2, 1890, 28 Stat. at Large, pp. 81-100). Its Legislature (Sec. 4 of that Act) was an instrumentality of the United States,

and the laws enacted by it under the delegated authority were local laws of the United States. The deed was executed in 1903, almost four years before Oklahoma became a state, and throughout its life it meant what it meant on the date of its execution (*Oklahoma City* v. *Local Fed. Savings & Loan Assn.*, 192 Okla. 188; *Jones* v. *Oklahoma City*, 193 Okla. 637). Upon Oklahoma's admission into the Union, only such territorial laws became effective therein as were adopted by its Constitution, but Section 1 of the Schedule of that Constitution provided that "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the forms of government had taken place." It follows, therefore, that no statutes enacted by the State of Oklahoma and no decisions of the latter's Supreme Court governed the interpretation of the deed, but that the same is to be interpreted in accordance with general law, and especially in accordance with decisions of this Court heretofore cited.

Petitioners contend that it was agreed that the deed was ambiguous; and upon that alleged agreement they predicate their contention that the oral testimony of petitioner, Clarence O. Russell, to the effect that it was orally agreed and understood between him and the Commissioners that the property should be used perpetually for court purposes was competent. As to that, we request the Court to read pages 36-42 of the transcript, which show that respondent consistently objected on the ground that the deed was not ambiguous, and that the alleged stipulation was in fact coerced. Also, the objection to the testimony men-

tioned was made after the making of the alleged stipulation, and constituted either a retraction of it or an exception to it. The facts were these:

After the alleged agreement petitioners offered the deposition of Clarence O. Russell in evidence (41). The court stated that he had read it, and that there was no use to read it again, whereupon respondent's attorney said:

> "Are you going to consider that here? There are certain self-serving elements in there I would like to reserve my objections to, if they may be considered."

To which the Court replied:

> "If it is satisfactory with you, can we consider it objected to and objection overruled? This is a court case, and I am not going to consider any evidence that is not competent" (41).

And petitioners' attorney stated that, "The defendant may have objections to any questions they desire, and it will be shown to be overruled" (42).

Notwithstanding respondent was given no opportunity to make specific objections to those particular questions and answers, and notwithstanding the court's overruling of the objections which he knew respondent intended to make, and his statement that, "I am not going to consider any evidence that is incompetent," the court considered and gave effect to petitioner's incompetent and inadmissible statements. Thus, in his sixth finding the court said (28):

> "At the instance of both parties, extraneous evidence was introduced at the trial to aid in the inter-

pretation of the conditions of the deed. *Upon this evidence* and the language of the deed * * * this court finds that it was the intention of the parties, *and particularly of the grantor*, that the grant was on the conditions (1) that the courthouse should be used continuously after its erection for courthouse purposes * * * ."

And in a memorandum or written opinion, he said:

"The real contention of defendant is that there was no agreement to use the ground *perpetually* for courthouse purposes, or to make appropriations to care for the trees any specified length of time. These matters are disposed of by contrary findings of fact. *The testimony of Mr. Russell is clear and convincing*" (30).

The court's statement that extraneous evidence was introduced at the instance of both parties to aid in the interpretation of the condition of the deed is not correct. Respondent introduced no extraneous evidence for that purpose. It did not introduce that deposition, and the only witnesses it introduced were J. M. Owen (72) and Mike Donnelly (85), and neither of them were asked to give or purported to give any testimony relating to the interpretation of the condition in the deed. The only evidence bearing upon that question was that of petitioner himself, introduced by his attorney over respondent's objection, and which the court stated would not be considered if incompetent.

Moreover, in fact, there was not the slightest ambiguity in the deed. Petitioner Russell's testimony that it was the agreement and understanding that the use of the property for court purposes should be perpetual was not only

incompetent, but was wholly without probative effect. Conditions subsequent cannot be created or enlarged by parol [4 Thomp. on Real Property (Perm. Ed.), Secs. 2039, 2044, 2096, and 2097; *Dunbar* v. *Stickler et al.*, 45 Iowa 384, 386].

It is everywhere held that except in actions to cancel or reform a deed, oral evidence is incompetent to change its legal effect [*Dixon* v. *McCann*, 87 Okla. 109, 206 Pac. 597; *Smith* v. *Godfrey*, 200 Iowa 768, 205 N. W. 366; *Kelley* v. *Saltmarsh*, 146 Mass. 585, 16 N. E. 460; *Morris Canal & Banking Co.* v. *Ryerson*, 27 N. J. L. 457, 466; *Union Selling Co.* v. *Jones*, 128 Fed. 672; and *Frenzer* v. *Frenzer* (8 C. C. A.), 2 Fed. (2d) 218].

Also it is the law that ordinarily, in interpreting deeds, they must be construed most strongly against the grantor and most favorably to the grantee [*Rogers* v. *Jones* (10 C. C. A.), 40 Fed. (2d) 333; *Edwards* v. *Brusha*, 18 Okla. 234, 90 Pac. 727; *Lowery* v. *Westheimer*, 58 Okla. 560, 160 Pac. 496; *Porter* v. *Warner-Caldwell Oil Co.*, 183 Okla. 1, 80 Pac. (2d) 252; *Levine* v. *Shaffer*, 190 Okla. 194, 122 Pac. (2d) 1010]. And that is particularly true as to conditions subsequent contained in them.

The purpose of the condition was fulfilled. Petitioner testified that he then owned other property "scattered all over Oklahoma City," some of which was in the same block as were the lots conveyed (104-107); and that, "if the courthouse was built anywhere within reasonable distance of the business center, it would have a tendency to increase values; it would increase values there"; that the construction of public buildings "tends to enhance the value of all real estate in the city, particularly in the business dis-

trict" (115). Petitioner received $4,000 in cash and the subscriptions of the citizens to induce the location for the lots conveyed, and he testified that before 1915 he had disposed of all his real estate near the courthouse (107-108), and by 1920 had disposed of all his property in the city (103). Having received the $4,000 in cash and the citizens' subscriptions and presumably enhanced prices for his other property, in 1918 he moved to California where he still resides (102-103). For 30 years before suing he had been a non-resident of the state and for 28 years had owned no property therein. He testified that, "I don't think I am damaged at this time" (111), and that the maintenance of the trees would be of no benefit to him personally (123). In addition, the courthouse and jail were constructed and used and the trees cared for to petitioner's satisfaction for 34 years. In that situation, the law says that the condition had served its purpose and was at an end.

In *Maddox* v. *Adair,* 66 S. W. 811, by the Court of Civil Appeals of Texas, the second and third syllabi are as follows:

> "Where a grantor conveys realty to be used for school purposes, in order to increase the value of adjacent property, on condition that, on the grantee's failure to establish and maintain the school, the premises shall revert, and a school is maintained until the grantee has disposed of his adjacent property, he cannot claim a forfeiture after discontinuance of the school, as the purposes of the condition were fulfilled.
>
> "The condition of the deed having been complied with, and the grantee's title perfected, the grantor can-

not complain of the abandonment of the property and the intrusion of a trespasser."

It is submitted that the petition should be denied.

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July, 1949.